IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 4062 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RUPABEN MAHADEV THAKKAR - Appellant(s)
Versus
MUDIBAI MEGHABHAI HARIJAN & 5 - Defendant(s)

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Appearance :
MR DK ACHARYA for Appellant(s) : 1,
MR KIRTIDEV R DAVE for Defendant(s) : 1 - 2, 4,
MR RAHUL K DAVE for Defendant(s) : 1 - 2, 4,
NOTICE NOT RECD BACK for Defendant(s) : 3,
MS HINA DESAI for Defendant(s) : 5,
NOTICE SERVED for Defendant(s) : 6,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 27/12/2007

ORAL JUDGMENT

1. The present appeal is preferred by the owner of the tanker involved in the accident from which claim of respondent Nos.1 to 4 arose. On

24.05.1989, tanker No.GTY-5535 dashed with the stationary vehicle parked on the road for the purpose of changing tyre and the deceased victim of the accident, who was alleged to have been employed as a cleaner, received fatal injuries at the age of 25. The claimants, widow and two minor children of the deceased, filed M.A.C.P. No.679 of 1989 and, by impugned judgment and award dated 24.08.1998, only the owner and the driver of tanker No.GTY 5535 were held liable to pay, by way of compensation, Rs.2,46,000/- with cost and interest at the rate of 15% from the date of application till realisation.

2. Learned counsel for the present appellant, owner of the tanker, submitted that the impugned award was perverse and illegal in so far as the Insurance Company i.e. respondent No.5 herein, was exonerated from its obligation to satisfy the award on the ground that the deceased victim of the accident was assumed to be a gratuitous passenger. The argument of the Insurance Company which was accepted in the impugned award was that, “deceased Meghabhai was not the cleaner as per the requirement of IMT-16 under the policy of insurance as no record regarding the employees of the policy holder/owner of the truck was produced at (sic) it is mandatory and therefore, the deceased was

merely a gratuitous passenger in a goods vehicle of opponent No.2 insured.”

3. On perusal of the Record and Proceedings, it was seen from the evidence that not only that the claimant-widow had deposed at Exh.36 but the driver of the stationary vehicle had stated in the F.I.R. lodged immediately on 24.05.1989 that the deceased was travelling in the offending tanker as a cleaner. That statement was further supported by deposition of Sureshbhai Thakar (Exh.46), who stated in his deposition that he was an accountant in Krishna Transport, in whose business, the truck was deployed and had also given a certificate (Exh.40) for the wages earned by the deceased as a cleaner. Thus, there was clear and sufficient evidence and complete absence of any evidence to the contrary for coming to the conclusion that the deceased was serving as a cleaner and as an employee under the owner of the offending vehicle. There was no dispute about the fact that the tanker in question was insured at the relevant time by respondent No.5.

4. Learned counsel Ms.Hina Desai, appearing for the Insurance Company, supported the award and vehemently argued that, it was incumbent upon the claimants or the owner of the tanker to

produce relevant record of wages and employment of the deceased and, in absence of such evidence, the Tribunal had rightly exonerated the Insurance Company from any liability to indemnify the owner and satisfy the award. Ms.Desai relied upon the Division Bench judgment of this Court in **New India Assurance Co. Ltd. V/s. Mohanbhai Ravjibhai and others [1994 ACJ 970]**, wherein it was held that when policy is issued subject to endorsement Nos.16,21,22,23 and 26 annexed to the policy, IMT-16 which forms part and parcel of the policy, implied that the conditions and stipulations as provided by the endorsement would have material bearing on the liability covered by the policy. It was, on that basis, submitted that in absence of any evidence of compliance with the conditions and stipulations contained in IMT-16, the Insurance Company could not be held to be liable under the policy. She further submitted that the award of interest at the rate of 15% was on the higher side and not justified. It was also submitted by her that the owner had not paid or deposited any amount pursuant to the impugned award and the claimants had also not filed any execution proceedings which indicated that the claimants and the owner of the truck were in collusion.

5. Learned counsel Mr.D.K. Acharya, appearing for the appellant, submitted that

policy of insurance produced before the Tribunal by the Insurance Company itself clearly showed that special premium for liability to public risk including any one passenger and legal liability to paid driver and cleaner and six coolies were covered and special premium therefor was collected by the Insurance Company. Thus, the policy was expressly a policy on comprehensive premium subject to endorsement Nos.21,22,23,26, 16 and 1 which endorsements were not produced before the Court. It was also pointed out from record that the Insurance Company had amended its pleadings at the fag-end of the trial after evidence of the claimants was already recorded, so as to add the plea and objection of non-compliance of IMT-16. Learned counsel Mr.Acharya also relied upon recent judgment of the Hon'ble Supreme Court in **National Insurance Co. Ltd. V/s. Laxmi Narain Dhut [(2007)3 SCC 700],** wherein the ratio in **National Insurance Co.Ltd. V/s. Swaran Singh [(2004)3 SCC 297]** is reiterated to hold that the Insurance Company is required to prove breach of the condition of the contract of insurance by cogent evidence and in absence of such proof, it cannot be absolved of its liability. In the facts of the present case, admittedly, the Insurance Company had not led any evidence and, in absence of positive proof, it cannot be presumed in favour of the Insurance

Company that any of the conditions of policy was violated either by the insured or the driver of the vehicle involved in the accident.

6. The fact remains that the deceased lost his life in the accident arising out of the use of motor-vehicle and the claimants were not in receipt of any amount so far. By preponderance of evidence, it has to be held that the deceased was employed as a cleaner by the owner of the tanker and the insurance policy necessarily covered the risk of the employee, employed as driver or cleaner of the tanker.

7. Therefore, the appeal is allowed and, on a fair concession made on behalf of the claimants by learned counsel Mr.Kirtidev R. Dave, the impugned award and order is modified to the extent that respondent No.5 shall also be jointly and severally liable to pay Rs.2,46,000/- as compensation with cost and interest at the rate of 9% p.a. from the date of application till realisation. In view of delay caused in the present proceeding for one or the other reasons, the amount shall now be required to be deposited by respondent No.5 within a period of one month with the Claims Tribunal at Gandhidham where the claimants are stated to be residing. The amount deposited by the appellant in this Court for the

purpose of appeal shall be transmitted to the Claims Tribunal at Gahdhidham and may be refunded to the appellant after the Insurance Company deposits full amount of compensation with cost and interest.

(D.H.WAGHELA, J.)

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